

Testimony of
National Association of Consumer Advocates

by

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Consumer Credit and Debt: The Role of the FTC in Protecting the Public

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Mr. Chairman, Ranking Member Radanovich, and members of the Subcommittee, thank you for inviting me to testify about our current consumer credit and debt crisis and the role the FTC could have and must now play in protecting American consumers.

My name is Ira Rheingold, and I have been a public interest attorney for my entire career. I have worked in some of our nation's poorest urban and rural communities and I've witnessed the incredible resilience and optimism that mark the great strength of our nation's people. I have also seen the incredible fear and despair of Americans faced with mounting debt, the loss of their long-term home and ultimately their inability to provide for their families.

In the mid-1990s through 2001, I lived and worked in Chicago, where I ran the Legal Assistance Foundation's Homeownership Preservation Project. During those years, I watched (and worked against) the unfair and deceptive practices of all the actors in the mortgage and credit industries, that slowly, but inexorably stripped away the wealth of that city's low and moderate income minority communities. Today, I am the Executive Director of the National Association of Consumer Advocates (NACA), an organization of attorneys and other advocates who represent those very same consumers and communities all across this country. At NACA, I also manage the Institute for Foreclosure Legal Assistance, a project that provides funding and training to non-profit legal organizations that help homeowners negotiate alternatives to foreclosure. In my current roles, I speak to and assist our nation's consumer advocates who, on a daily basis, meet with and represent the consumers victimized by bad lending practices and see the very real-life consequences of an out of control mortgage and credit marketplace. What I see from them are the same unfair and deceptive practices that I personally witnessed in Chicago, except now, those behaviors have moved across all of our nation's communities. What I hear from their clients is the same fear and despair that I heard all too often on the streets of Chicago. At today's hearing, I hope that you will hear their voices through me, and that you will begin to see what we all need to do to rebuild a federal consumer protection regulatory structure that actually serves the needs and demands of consumers and communities across our nation.

Introduction

By now, the collapse of the American credit system is a well-known story. Over the last several decades, as our consumer credit marketplace grew in dizzying complexity, the fundamental consumer protections necessary to keep order and fairness in place were simultaneously being eviscerated and abandoned. Through Congressional inaction, overreaching Supreme Court decisions, and federal regulatory agencies determined to protect credit providers from state consumer protection laws, we are now faced with a consumer credit crisis unmatched in our nation's recent history. While much can be said about the cynical and destructive role played by our federal bank regulatory agencies (a special place in the regulatory Hall of Shame is reserved for

leaders at the Office of the Comptroller of the Currency and the Office of Thrift Supervision), my testimony today is focused on the role the Federal Trade Commission could have and should have played in preventing our current debt and credit crisis. In my testimony, I will explore what the FTC could have done to protect consumers; what it should be doing right now; and what additional authority it needs to successfully fulfill its role as the federal consumer protection agency.

The FTC's Role in protecting consumers

Fundamentally, the FTC is the sole federal agency whose role is to protect the American consumer. The agency has the authority to provide this protection through *rulemaking*, through its *oversight authority* and by bringing *enforcement* actions. While it's clear that the FTC's response to consumer protection in the credit market has been inadequate, it is worth looking at why this failure occurred and what we can do about it.

FTC's Rulemaking Authority

Under its rulemaking authority, the FTC has the ability to define "unfair or deceptive acts and practices (UDAP)." While this authority can be applied to all types of businesses, in the credit market the FTC's authority is somewhat limited because: (1) it doesn't have full authority over all financial services institutions; its ability to issue effective rulemaking is quite limited.

First, unfortunately, UDAP rule-making authority for federally chartered depository institutions is given to the Federal Reserve (for banks), the OTS (for thrifts) and NCUA (for credit unions.) While this may expressly limit the FTC's authority over these financial services institutions, if it was willing and aggressive, the FTC could still developed relevant UDAP rules that would apply unless their federal regulators specifically determined that the practice was not "unfair or deceptive" when a bank or credit union did it, or if the FRB determined that the UDAP rule would interfere with monetary and payment system functions.

Second, while a strong, aggressive consumer protection agency (unfortunately, not the FTC over the last decade) might have attempted to promulgate rules that declared a myriad of bad credit practices "unfair," even that type of agency might have been stymied by the unfortunate special rule-making procedures Congress imposed on the FTC in 1975. This so-called "Magnuson-Moss" rule-making is much more cumbersome, lengthy, and expensive, than the standard agency "notice-and-comment" rule-making procedure prescribed by the Administrative Procedures Act. Considering it took the FTC over 10 years, using these rules, to enact its' Credit Practices Rule, even if the FTC had

the will to do good rulemaking, by the time the process was complete, the likelihood that the rule would have been relevant and effective in dealing with our current crisis is almost nil.

Oversight Authority

Another way an agency can get ahead of the curve to prevent abuses or stop them before they get out of hand is through the exercise of oversight authority. As a “generalist” agency charged with “consumer protection” over the entire market, the FTC has limited resources to carefully examine all the predatory and abusive practices that happen on a daily basis. Despite this obviously difficult task, the terrible problems that existed in the credit marketplace were obvious to many, and if the FTC had the “will” to actually engage in real oversight, much could have been done to protect the American public from the current credit crisis.

I think one of my biggest disappointments with the FTC is the agency’s overall failure to engage with the people who should be their allies in their mission to protect consumers. As someone who talks to public, private and legal service consumer attorneys every single day, I very much believe that the FTC has fundamentally failed to engage the consumer advocacy community. If the agency had developed those relationships, it would have been well aware of the widespread abuses in the mortgage lending and servicing market, the incredible growth of fraud in the automobile financing world, the abusive payday lending industry tactics that specifically target our nation’s service personnel, the evolution of a “debt-buying” industry that systematically collects debt that it has no proof is actually owed, the development of a fair credit reporting system that is neither fair or accountable to consumers and on and on and on.

Law Enforcement – Prosecutions and Deterrence

While the FTC has historically attempted to bring some enforcement actions against some of the bad actors in the consumer credit marketplace (most notably Associates, Household and Fairbanks), their lack of staff and resources, and more importantly the lack of political will at top of their agency has minimized the effectiveness of the results of these actions. Had the FTC been willing, like the Massachusetts Attorney General in its Fremont case, to use its “unfairness” authority to declare the lack of underwriting, risk-layering, poisoned products pushing business model that was prevalent in the mortgage market to be a violation of the FTC Act, a real stand could have been taken against our nation’s corrupt mortgage lending system. Instead, the FTC’s passive enforcement actions wound up identifying certain distinct practices that

the mortgage industry learned to avoid, without doing anything to fundamentally alter the way this broken industry did business.

Recommendations for the Future

In examining what the FTC can and should do to ensure a fair and just consumer credit marketplace, I will first address the specific areas they need to focus on right now and then look at the structural changes needed to embolden the FTC to act as a real consumer protection agency

Enforcement Actions

If the FTC was engaged with the rest of the public and private consumer advocacy community, it would have no shortage of public enforcement actions to bring against bad actors and their “unfair” practices in the consumer credit marketplace. Possible enforcement actions would include the following areas:

Fair Credit Reporting Act

For the past eight years there has been little regulatory action in regards to the “Big Three” consumer reporting agencies (CRAs). Unfortunately, this inaction (and the last administration’s failed philosophy that industry can police itself) has led to a completely broken system for investigating consumer credit report disputes and is rife with inaccurate information from furnishers, mismatched information in files, and abusive reporting by debt collectors and debt buyers.

Payday Lending

The FTC should prohibit payday lenders from holding a check or any electronic equivalent as security, and from taking any direct access to consumer’s checking account. The practice by payday lenders of holding a post-dated check or an electronic debit authorization are coercive, injure consumers, and give creditors the unwarranted ability to exercise self-help remedies. Asking for a post-dated check against an account that does not have the funds to cover it is meant merely as a form of terror against the consumer. It exposes the consumer to bounced check fees, extortion that leads consumers to rollover their loans or take out multiple payday loans to cover the first, and the threat of criminal prosecution for a bad check. It gives the creditor a self-help remedy that prevents the consumer from asserting the claims and defenses, including wage exemptions, generally available against debt collection or predatory loans.

Debt Collection

The FTC should undertake an aggressive enforcement program against debt collection abuses. These days, typically debt collection agencies seldom have proof of the underlying account and rely on small claims courts and private arbitration forums to rubber stamp claims they cannot really prove through evidence. Furthermore, the FTC should declare unfair the debt collectors attempts to collect on time-barred debts, deceptive settlement agreements, putting old debt on new credit cards, and cross collection by refund anticipation lenders.

Debt Settlement Companies

The FTC's own workshop showed that these services benefit no more than 3% of the consumers who pay for them. The FTC should ban the charging of any fees to consumers until and unless their debts are actually reduced. Furthermore, fees charged by these companies need to be capped at a reasonably low percentage of the amount by which the debt is actually permanently reduced.

Auto Fraud

One of the single biggest complaints I hear from consumers and consumer advocates (particularly military legal service attorneys) is the incredibly abusive practices of car dealers and non-bank subprime lenders in the sale and financing of automobiles. The FTC can and must step up enforcement of the Used Car Rule, especially regarding rebuilt wrecks, laundered lemons, and "certified" vehicles where the warranties are represented as being in effect, but in fact are partially or entirely void. Furthermore, the FTC needs to examine and stop the standard bait and switch car financing practices that have left hundreds of thousands of Americans with unaffordable car loans.

Mortgage Servicing

It is clear to anyone reading the newspaper that the mortgage servicing industry is completely incapable of doing the loan modifications necessary to keep millions of Americans in their home. Equally clear, although not quite as publicly discussed is the mortgage servicing industry's fundamental structural problems which promotes the charging of unwarranted fees and limits the ability of a servicer to properly account for the payments made by distressed homeowners. Furthermore, it's an absolute scandal that mortgage servicer's across the country continue to bring foreclosure actions against homeowners without the basic proof necessary to establish that they have the right to take away a person's home.

While the above items are some of the actions the FTC can and should take using its existing “unfairness” authority, there are also substantive structural changes that need to be made so that the FTC can be a fully functioning and effective consumer protection agency.

Structural Changes

The FTC Should Receive Enhanced Rulemaking and Civil Penalty Authority.

As I described earlier, even if the FTC had the political will to tackle the terrible abuses that existed in the credit marketplace, their archaic Magnuson-Moss rule making authority would have prevented the agency from actually promulgating effective rules. For the FTC to be an effective consumer protection agency, they must be given APA rulemaking authority, as well as clear rule-writing authority under the FTC Act and the Fair Credit Reporting Act. Congress should also urge the FTC, when it engages in rulemaking, to be willing to aggressively use its unfairness authority.

The FTC Should Have Concurrent FTC Act Authority over National Banks, Thrifts and Credit Unions.

Unlike the federal banking agencies, who besides clearly demonstrating that they neither have the political will, ability or desire to protect consumers, also have a “safety and soundness” function, the FTC’s sole focus is to protect consumers. As the only federal agency that has no conflict of interest from the fee income it receives, has no fear that aggressive enforcement will lead to charter-shopping, and hopefully does not view banks, thrifts and credit unions as their customers, it is essential that the FTC’s unfairness rulemaking applies to all financial service institutions.

There Should Be a Private Right of Action and State Attorneys General Must Be Allowed to Have Greater Enforcement Rights Under the FTC Act.

Even an actively engaged and aggressive Federal Trade Commission will never have the resources to stop all the bad practices that exist in the American credit marketplace. Despite the recent demonization of private and legal services consumer attorneys, they play an absolutely essential role in keeping the consumer market functioning in a just and fair manner. For consumers to have real protection, these attorneys, and our state’s attorneys general, must be given the power to assist the FTC in enforcing the federal UDAP statute.

Aiding and abetting liability

In today's complex marketplace, few transactions involve only a consumer and seller of goods or services. Clarifying aiding and abetting liability will help assure that all those involved can be reached by the law.

Conclusion

During the last decade, the Federal Trade Commission failed to protect consumers from the unfair and deceptive practices that have led to the collapse of our nation's mortgage and credit markets. I can only hope that with additional resources and expanded authority and with a new found political will to aggressively use its unfairness authority, the FTC will return to its place as an agency committed, above all else, to consumer protection.